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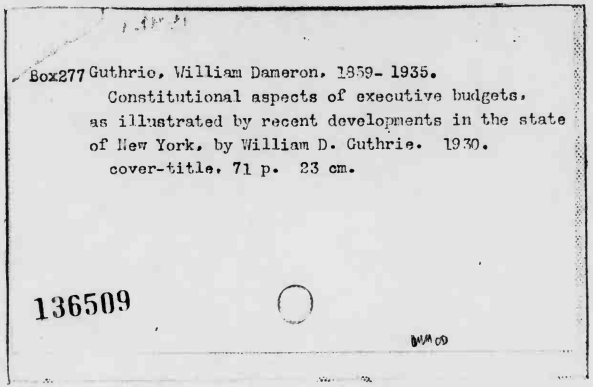

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CONSTITUTIONAL ASPECTS OF EXECUTIVE BUDGETS

AS ILLUSTRATED BY RECENT DEVELOPMENTS IN THE STATE OF NEW YORK

by

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April, 1930.

June 5, 1930 DA/H.C.

CONSTITUTIONAL ASPECTS OF EXECUTIVE BUDGETS

as illustrated by recent developments in the State of New York.

In determining novel questions of constitutional law as they arise from modern conditions, it is the practice of our courts, federal and state alike, to recur to the fundamental principles upon which the American constitutional systems of government were originally based, and each generation is consequently called upon to study anew the origin and foundations of these principles and to analyze their scope and operation. As Mr. Justice Brewer pointed out in the famous *Debs* case, "constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation".[1] The recent widespread movement for executive budgets has presented a new matter of governmental administration and a new occasion for recurrence to the study of fundamental principles. The solution of the constitutional questions thus arising, it is believed, will depend in great measure upon the application of the doctrine of the separation of powers.

Few principles in the constitutional law of modern peoples occupy so important a place as the principle of the separation of governmental powers, the essential element of which is that the same body of persons that enacts a law shall not execute or construe it. This principle was undoubtedly uppermost in the minds of the founders of our federal and state governments, and The

[1] *In re Debs, Petitioner*, 158 U. S. 564, 591.

Federalist tells us it was regarded by them as "the sacred maxim of free government" and essential to the due operation of the systems they were establishing. And it is still being constantly applied and enforced by our federal and state courts.

The American statesman or jurist who is called upon to deal with this doctrine in a concrete way, however, finds himself in a field where there are not only complex and delicate distinctions in the application of principles, but where the very meaning of the principles themselves is a matter of sharp differences of opinion. In this review, there will be no attempt to deal with so broad and controversial a subject with any scientific or comprehensive thoroughness. It will only be discussed with respect to its special relevancy and importance in connection with the subject of budgetary reform.

In the recent case of *Springer* v. *Philippine Islands*,[2] the Supreme Court of the United States reiterated that, in our governmental and constitutional systems, the separation of powers, and the consequent exclusive character of the functions conferred upon each of the three departments—legislative, executive and judicial—are basic and vital, and not merely a matter of governmental mechanism, and it was added: "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power;

[2] 277 U. S. 189, 201.

the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers* v. *United States*, 272 U. S. 52."

The unanimous opinion of the court in the case of *Hampton & Co.* v. *United States*,[3] decided only one month prior to the *Springer* case, had been similarly emphatic, viz.: "The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to

[3] 276 U. S. 394, 406.

the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."

The principle of the separation of powers is incorporated in one form or another expressly or impliedly in every State Constitution, although neither the due process of law clause, nor the guaranty of a republican form of government, nor any other provision of the Federal Constitution so requires;[4] and innumerable emphatic declarations as to the applicability and efficiency of the doctrine are to be found in the decisions of the courts of the several States.[5] Indeed, many of the major problems that have arisen during the course of American constitutional history have in one form or another involved the application of this principle. It is, nevertheless, doubtful whether its essential elements have ever been adequately or comprehensively dealt with in any American treatise on constitutional law. Judicial opinions have

[4] *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 225; *Dreyer* v. *Illinois*, 187 U. S. 71, 84; *Vil. of Saratoga Springs* v. *Saratoga Gas, etc. Co.*, 191 N. Y. 123, 133.

[5] Cooley's Constitutional Limitations, eighth ed., p. 175, *ff.*; *People ex rel. Burby* v. *Howland*, 155 N. Y. 270, 282; *Matter of Davies*, 168 N. Y. 89, 101.

been inadequate. They are necessarily limited to the precise and narrow points actually presented for decision in the course of adversary litigation. Opportunity for comprehensive and systematic analysis and development of a constitutional doctrine as an entirety is seldom afforded in litigation, and even when afforded is seldom availed of either by counsel or court. It has always been the policy of our courts to avoid passing upon questions of constitutional power or limitation unless the case or controversy properly before them for adjudication actually required the decision of the questions. The settled practice of the Supreme Court of the United States in this respect was declared in the case of *Steamship Co.* v. *Emigration Commissioners*,[6] to be as follows: "It is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safeguards to sound judgment. It is the dictate of wisdom to follow them closely and carefully."

The subject of the separation of powers has, therefore, been studied in our jurisprudence generally from particular and limited points of view, or with emphasis upon exceptional situations. The belief, furthermore, has been gaining some currency that the doctrine itself has become more or less antiquated and devoid of binding force, or, as a recent writer has phrased it, that it merely "exists as a theology".[7] Such a view is unwar-

[6] 113 U. S. 33, 39.

[7] 29 Columbia Law Review, 1052, 1055.

ranted, and is being again and again refuted by the decisions of our courts. The doctrine in its essential elements has always continued and still is basic, vital and potent in the American constitutional systems. As Chief Judge Cardozo has stated,[8] "the exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers"; but he did not intimate that there was any such elasticity as would permit conferring upon members of one department what was of the essence of the exclusive powers and functions of another department, or as would, for example, allow members of the legislature to act both as legislators and executive or judicial officers at the same time.

Professor Frederick Green of the University of Illinois, in an interesting and instructive analysis of the subject,[9] pointed out that there was need to challenge any assertion that the tripartite division was "a fiction either of law or of political science, void of significance or value, necessarily disregarded in fact, or incapable of consistent application except by pretense." He correctly urged that "it is no real objection to a classification of governmental activities that action classed under one head savors in some degree of the characteristics of action classed under another," and that "it is a mistake to think that the distinction between the functions of government is unreal because there is often a choice

[8] *Matter of Richardson*, 247 N. Y. 401, 410.

[9] Separation of Governmental Powers, 29 Yale Law Journal, 369.

which to use." He summarized his views in the following language: "In conclusion, it is submitted that though in the increasing complexity of governmental activity it has become necessary to vest administrative officers with an authority less closely restricted, and thus to narrow the field in which courts can give relief against executive mistake, as well as the field in which the doctrine of the separation of powers has application, it is nevertheless quite untrue to say that the doctrine is unreal or has broken down. On the contrary, the cases show it to be active, effective and capable of consistent application. . . . It may or may not be regrettable that government nowadays takes control of matters about which the legislature cannot make laws sufficiently precise to be applicable without aid from the rule-making powers of a commission . . . It concentrates on each department responsibility for the proper performance of its peculiar function, and since the work of each department calls for special aptitude and experience, it brings about a desirable division of labor."

The idea that the doctrine of the separation of powers has ceased to operate as an active and controlling governmental principle has obtained the currency it has principally because of the extraordinary development that has taken place in the functions of administrative bodies or commissions during the past half century, a development that has vested in the same body not only indisputably executive powers, but likewise powers generally characterized as "quasi legislative" or "quasi judicial". It is, however, inaccurate and misleading to conclude that this development necessarily

constitutes a violation or nullification of the doctrine of the separation of powers.

Even if particular functions be correctly classified as technically "legislative" or "judicial", there might still be no violation of the principle. For it does not require —and was never interpreted as requiring—any absolute, rigid and impracticable degree of separation, nor does it impose an abstract definition or an *a priori* classification of particular functions as executive, legislative, or judicial, and exclude sensible approximation or reasonable governmental co-ordination. Each department, without violation of the principle of the separation of powers, may exercise not only those powers strictly and inherently characteristic of its own branch of government, but also such other powers, whatever their classification may be, as are reasonably incidental or germane to the due exercise of its own primary functions. In the case of the executive department, for example, its primary function is that of executing the laws, although there can be no doubt that the conditions of modern life and the ever-widening scope of governmental activities have transformed this function into something far more complex and extensive than the relatively simple functions of a century or more ago. The legislature to-day could not practically determine or fix the detailed execution or application of many of the laws that it enacts. Necessarily, it must leave numerous matters to be regulated in detail by the executive department, often by the exercise of the power of subordinate rule-making. But, however complex and extensive these activities of the executive department have necessarily grown to be, however

diverse the kinds of powers they comprehend, and even if some of these powers might, abstractly considered, be classified as in their nature legislative if exercised by a legislative body, nevertheless, the essential fact remains that they are all of them exercised in the due performance of the inherent duties vested in the executive department; they are all of them incidental, germane and necessary to the distinct function of executing or carrying out laws which have been enacted by the legislature.

There is also danger of overlooking that, although these administrative bodies have necessarily been given increasing rule-making or regulatory powers, they constitute, nevertheless, only a part of the body politic, and that the doctrine of the separation of powers transcends this field and is to a great extent unaffected by any developments that may have taken place within it. It is a noteworthy fact, which is recognized by some writers who assert that the doctrine of the separation of powers has broken down in the United States, that the alleged instances of relaxation have been "invariably in favor of administrative power."[10] It by no means follows that the courts would equally sustain or permit innovations that encroached directly or indirectly upon the executive or judicial department. There can be no doubt, as The Federalist discloses,[11] that the original framers not only attached supreme importance to the principle of the separation of powers, but, with characteristic sagacity and foresight, apprehended encroachment and usurpation by the legislative rather than by the executive or judicial de-

[10] Administrative Law (1929), by Frederick John Port, p. 20.
[11] No. 48.

partment. The courts likewise have not generally apprehended encroachment by the executive department, and have consequently been lenient with respect to the exercise by this branch of power conferred upon it by the legislature, as the elasticity inherent in the doctrine of the separation of powers and the necessities of governmental co-ordination have dictated. But when the case presented has been one of direct encroachment by the legislature itself—encroachment which, as The Federalist pointed out, was so much more dangerous and far-reaching in its effect—a very different question has arisen, and there are cases to testify to a much stricter attitude on the part of the courts. The decision of the Court of Appeals of the State of New York in the recent *Executive Budget* case, checking legislative encroachment upon the executive department, which is the subject of the present study,[12] affords a striking confirmation of these views, and its ruling is of special timeliness and significance, not only because of the light which it sheds upon the subject of the separation of powers and the proof it furnishes of the continued vitality and effectiveness of the principle, but also because of the intrinsic importance of the subject of budgetary reform.

It is, moreover, believed to be inaccurate to classify the powers and functions of these administrative bodies as legislative. Chief Justice Marshall pointed out in the early case of *Wayman* v. *Southard*[13] (1825), that, under the American constitutional system (thereby referring to the separation of powers), powers which are "strictly

[12] *People* v. *Tremaine*, 252 N. Y. 27.
[13] 10 Wheaton 1, 42, 43, 46.

and exclusively legislative" could not be delegated by the legislature, but that there were other powers which it might rightfully either itself exercise or commit to the discretion of one of the other departments. He added that "the line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details;" and he further added that "the difference between the departments undoubtedly is, that the legislature makes, the executive executes and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not enter unnecessarily."

After the lapse of a century, the line has not yet been exactly drawn, if indeed capable of being exactly drawn, and the subject is still as delicate and as difficult as it was in those early days. For example, although the Supreme Court of the United States has declared that the principle that Congress cannot delegate legislative power is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution",[14] there nevertheless is much that is irreconcilable with this declaration in the terminology which it has employed in other cases, and there has been no adequate analysis or differentiation by

[14] *Field* v. *Clark*, 143 U. S. 649, 692.

it of those powers which are inherently or strictly and exclusively legislative and as such not delegable, on the one hand, and, on the other hand, those which have been variously denominated as "quasi legislative", "not purely legislative", or "legislative in a sense", and as such capable of being committed to the executive department for execution or application. No comprehensive standard or rule has ever been fixed by which it can be determined whether a particular power or function is or is not so inherently or strictly and exclusively legislative as not to be delegable by the legislature either to the executive or to the judicial department. Certainly such phrases as are quoted above are altogether too vague and ambiguous to be of any definite aid or guidance.

What in many cases is characterized as a delegation of legislative power will be found on closer study to be, not a delegation of legislative power at all, but merely of power to enforce a law enacted by the legislature, or to act with respect to a particular subject within limits and for purposes delimited by the legislature itself; and this form or manner of legislation is not essentially different in kind from the ordinary law-making which prescribes executive, administrative, or judicial action in greater or less detail, being action which would otherwise be unauthorized by law.

Thus, the legislature may itself formulate and enact rules to govern judicial practice and procedure, or it may commit or assign that function or detail of regulation to the judicial department as incidental or germane to the functions appertaining to that department. Yet, in

so doing there is no delegation of legislative power, and in so regulating practice and procedure the courts are exercising judicial and not legislative functions. As Mr. Justice Thompson pointed out in *U. S. Bank* v. *Halstead*[15] (1825): "But it does not follow that because Congress might have done this, they necessarily must do it, and cannot commit the power to the courts of justice. Congress might regulate the whole practice of the courts, if it was deemed expedient so to do: but this power is vested in the courts; and it never has occurred to any one that it was a delegation of legislative power."[16]

So likewise as to the executive department: legislative power—*i. e.*, the law-making function—is not being delegated when the executive department is authorized by a statute to establish rules and regulations or to ascertain and determine matters of fact in the execution, carrying out, enforcement, or application of the law as made by the legislature itself. "The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."[17] In a leading case, often cited with approval,[18] Mr. Justice Harlan announced: "'The true distinction', as Judge Ranney, speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised

[15] 10 Wheaton 51, 61.
[16] See also *Hanna* v. *Mitchell*, 235 N. Y. 534; 202 App. Div. 504, 513.
[17] *United States* v. *Grimaud*, 220 U. S. 506, 521.
[18] *Field* v. *Clark*, 143 U. S. 649, 693.

under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' ''

In another leading case, which involved power vested by Congress in the Interstate Commerce Commission,[19] the court explained: ''Furthermore, it is said that such construction of §20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 384; *United States* v. *Grimaud,* 220 U. S. 506.''

In the fixing of the rates and charges of what are now generically called public utilities, the executive or administrative bodies or commissions are not necessarily exercising a legislative power or function; but they are executing a law or applying or giving effect to a rule of action enacted by the legislature itself; they are generally investigating and determining some fact or state of things or particular condition ''upon which the law makes, or intends to make, its own action depend.''[20] The legislature has not delegated its legislative functions

[19] *Int. Com. Comm.* v. *Goodrich Transit Co.,* 224 U. S. 194, 214.
[20] *Field* v. *Clark,* 143 U. S. 649, 694.

in such cases, but has merely conferred executive or administrative authority and discretion, to be exercised in the ascertainment of facts or conditions to which may be applied the law as enacted by it within limits defined by it. In other words, the legislature itself has passed upon the necessity or expediency of the law, and what its general nature shall be, such as that rates or charges shall be just and reasonable.[21] What specific rates or charges are in fact just or reasonable must generally involve an investigation of complex and difficult facts and situations, and, if arbitrary action is to be avoided, must of necessity in most instances ''be a subject of inquiry and determination outside of the halls of legislation.''[22] The administrative body or commission in such instances is entrusted with no authority or discretion to legislate or to ordain what the law shall be. The fact that broad discretion in the application of the law, dependent upon facts or situations or states of things to be ascertained by them, is vested in these bodies or commissions, does not change the essentially administrative nature of the power they exercise in executing the law.

There are a number of opinions in which it is declared in one form or another that ''the function of rate-making is purely legislative in its character, and this is true whether it is exercised directly by the legislature itself or by some subordinate or administrative body to whom the power of fixing rates in detail has been delegated.''[23] The full, literal, and unqualified sense of this language

[21] E. g., United States Code, Title 49, section 15 (1); N. Y. Public Service Commission Law, section 49 (1).
[22] *Field* v. *Clark,* 143 U. S. 649, 693.
[23] *Knoxville* v. *Water Co.,* 212 U. S. 1, 8.

would be quite irreconcilable with the equally emphatic and unqualified declaration of the same court to the effect, as already quoted, that it "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution" that legislative power cannot be delegated.[24] But it is noteworthy that in most, if not all, the instances in which the constitutionality of grants of this so-called legislative power to executive or administrative bodies or commissions to pass upon or to fix or regulate rates or charges have been upheld, the enactment of the legislature actually prescribed a standard or rule which, as matter of law, these bodies had to follow and observe, such as, to repeat, that the rates or charges should be just and reasonable. Although in the *Saratoga* case,[25] decided by the New York Court of Appeals, there was no such specific enactment, there nevertheless was an equally effective provision which prescribed that the commission should fix rates "within the limits prescribed by law", and Chief Judge Cullen said on behalf of the court that this amounted to a direction that the rates should be reasonable, in accord with the rule of the common law.

Similarly, as to other so-called legislative powers delegated to administrative boards or officials: there is always an express or implied standard fixed by the legislature, from which the executive or administrative official cannot deviate. Thus, to cite familiar illustra-

[24] *Field* v. *Clark*, 143 U. S. 649, 692.

[25] *Vil. of Saratoga Springs* v. *Saratoga Gas, etc. Co.*, 191 N. Y. 123, 146.

tions, in *Field* v. *Clark, supra*,[26] the power given to the President to suspend provisions of the tariff act depended upon the prior ascertainment of the fact of foreign duties being "reciprocally unequal and unreasonable"; in *Buttfield* v. *Stranahan*,[27] the power delegated was to exclude tea found to be "of inferior purity, or unfit for consumption"; and in *Union Bridge Co.* v. *United States*,[28] the power delegated to the Secretary of War with reference to the removal or alteration of bridges depended upon the ascertainment of the fact that the bridge in question was an "unreasonable obstruction to free navigation".

However, mere terminology or nomenclature—whether or not particular functions be technically denominated as legislative in character—is not necessarily controlling. What is important is that the vital distinction between this sort of executive or administrative activity in obedience to and in aid of legislative mandates, and the application of legislative standards, on the one hand, and the legislative mandates themselves, on the other, shall be kept in mind, and that it shall be clearly recognized that the exercise of subordinate activities by the executive department does not constitute, and should not be construed as, a violation of the essential integrity of the principle of the separation of powers. Much more is here involved than a mere matter of academic nicety of expression, for although the cases as to the validity of and limitations upon the delegation of rule-making power to administrative bodies are generally in accord as to

[26] 143 U. S. 649, 680.

[27] 192 U. S. 470, 496.

[28] 204 U. S. 364, 387.

substance, in spite of their differences, ambiguities, or conflicts as to expression, the danger is that the unwarranted discrediting of the principle of the separation of powers in this particular field may be carried over to other questions, still unsettled, and have a misleading effect upon their solution. In fact, this very danger was evident in the New York *Executive Budget* case, here particularly under consideration (*viz.*: *People* v. *Tremaine,* 252 N. Y. 27), and it is for that reason that the above examination of the principle of the separation of powers has been deemed relevant and advisable.

The appropriation of public funds.

Prior to the recent amendments to some of our state constitutions,[29] no American constitution, federal or state, had dealt expressly with the subject of the initiation and preparation of an executive budget to cover the estimated cost of running the government. Until the recent movement for budgetary reform, there had been no adequate consideration in this country of the nature of the function of preparing a budget or initiating appropriations for the expenses of carrying on the government, and it had been almost universally assumed that the preparation of a budget and the initiation of appropriations were essentially and exclusively legislative functions and duties.

It should be interesting to note that a very different view had long prevailed in other countries, where the subject of financial reform is older and perhaps better

[29] Maryland (1916), West Virginia (1918), Massachusetts (1918), Nebraska (1920), Louisiana (1921), California (1922), and New York (1927). See also Public Budgeting (1929), by A. E. Buck, p. 28.

understood. In England, more than two centuries ago, the House of Commons voluntarily surrendered any initiative it had been exercising in the matter of financial measures, when, in 1706, during the reign of Queen Anne, it adopted the following rule: "This House will receive no petition for any sum of money relating to public service, but what is recommended from the Crown." And in 1866, this rule was renewed by the House of Commons in an order of the day reading: "This House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, unless recommended from the Crown."

Commenting on the limitation or restraint self-imposed by the British House of Commons, President Lowell of Harvard, in his treatise on the Government of England,[30] said: "This last rule, first adopted by a resolution in 1706, and made a standing order in 1713, was designed to prevent improvident expenditure on private initiative. It has proved not only an invaluable protection to the Treasury, but a bulwark for the authority of the ministry. Its importance has been so well recognized that it has been embodied in the fundamental laws of the self-governing colonies; while some foreign countries, like France and Italy, that have copied the forms of parliamentary government, without always perceiving the foundations on which they rest, have suffered not a little from its absence."

[30] The Government of England by A. Lawrence Lowell (1908), p. 279.

Lord Bryce, in his remarkably accurate and enlightening analysis of our governmental systems,[31] discussed the general subject of appropriations and the expenditure of public funds with reference to the Federal Government, and used the following language, which, though relating to Congress, is equally applicable to our state legislatures:

"There remains the power which in free countries has been long regarded as the citadel of parliamentary supremacy, the power of the purse. The Constitution keeps the President far from this citadel, granting to Congress the sole right of raising money and appropriating it to the service of the State. Its management of national finance is significantly illustrative of the plan which separates the legislative from the executive. In this supremely important matter, the Administration, instead of proposing and supervising, instead of securing that each department gets the money that it needs, that no money goes where it is not needed, that revenue is procured in the least troublesome and expensive way, that an exact yearly balance is struck, that the policy of expenditure is self-consistent and reasonably permanent from year to year, is by its exclusion from Congress deprived of influence on the one hand, of responsibility on the other. The office of Finance Minister is put into commission, and divided between the chairmen of several unconnected committees of both Houses. A mass of business which specially needs the knowledge, skill, and economical conscience of a responsible ministry, is left to committees which are powerful but not responsible, and

[31] The American Commonwealth (1924 ed.) vol. 1, p. 213.

to Houses whose nominal responsibility is in practice sadly weakened by their want of appropriate methods and organization."

In his work entitled "The Budget",[32] the well-known French economist and expert, René Stourm, writing of the governmental system of France, among other instructive comments, said:

"The Question of Initiative: Necessarily and legally the Executive prepares the budget. The Executive alone can and should do this work. Situated at the center of government, reaching through its hierarchical organization to the smallest unit, the Executive more than anybody else is in a position to feel public needs and wishes, to appreciate their comparative merits and accordingly to calculate in the budget, a just appropriation which each of these needs and wishes deserves. Others may know certain details as well, possibly better than the Executive, but nobody can have so extensive and impartial a view of the mass of these details, and no one can compromise the conflicting interests with as much competence and precision. Moreover, the Executive, charged with the execution of the budget, is compelled, through concern as to his future responsibility, to prepare as well as possible the plan."

In a report submitted to the New York Constitutional Convention of 1915 by its Committee on State Finances, Revenues and Expenditures, it was stated as follows: "(a) Upon [the Governor] rests the constitutional duty of seeing that the laws are enforced. The

[32] Translation published 1917, D. Appleton & Company, for The Institute for Governmental Research, p. 53.

departments whose estimates comprise by far the greater portion of the budget are the instruments through which he performs that constitutional duty. His relation to them is such as to make it his duty to constantly and naturally receive information as to their functions and puts him in a position to exercise that supervision over their co-operation and team work which is absolutely necessary for economy. He is the man who can insist that a given department shall do its work with less money or decide between several departments which is to be given the preference in respect to available revenues. He is the man who, under the present system, though less effectively, makes a similar decision when he prunes the appropriation bills with his veto. (b) Secondly, as the head of the State he is the one who can best explain and defend a given fiscal policy to the people of the State, and he is the one who, above all others, is interested in upholding before the people of the State a policy of economy and who should be held responsible to them for the success or failure of such a policy."

Notwithstanding the long established practice followed in England, antedating all our constitutions, of having the executive branch of the government initiate its financial program, the view has from the beginning widely prevailed in the United States that the initiation of appropriations and the preparation or formulation of budgets were essentially legislative functions. In some quarters, indeed, the doctrine of the separation of powers has been regarded as an obstacle to budgetary reform, although there is really no substantial basis for this view. In truth, for some of its most important aspects,

the practical efficacy of the executive budget system must finally rest upon the principle of the separation of powers. The better reason seems to be with those who urge that the concentration of financial responsibility on the executive, and the limitation of the legislature to the role of granting or refusing appropriations requested or recommended by the executive, would be logically in furtherance and not in violation of the constitutional relationship between the two branches and the scientific application of the principle of the separation of powers. Such concentration and limitation would preserve to the executive department its proper degree of independence and initiative in the conduct of its own internal management, which are necessary for its due functioning and which legislative encroachment has too often tended to submerge.

The technical and literal argument has been advanced that to allow the executive to propose the budget would be to grant to him the power to initiate legislation, and that this should be the exclusive function or prerogative of the legislative department. But, as Professor Walter F. Dodd urges,[33] "the determination as to what estimates should be presented by administrative departments for proposed future expenditures and the control of expenditures after appropriations are made, are primarily executive functions." The executive has always, as matter of course, been recognized as constitutionally authorized to present requests or recommendations for funds with which to carry on the government. Without any constitutional provision for an executive budget,

[33] State Government, 1928 ed., p. 258.

there is no constitutional reason why the legislative body should not make the recommendation of the executive, or a bill introduced by a member at his request, the sole basis of its action, as Parliament provided in its ordinance of 1706 and again in 1866. To permit the executive to propose a budget bill directly, without the intervention of a member of the legislature or the action of the finance committees of its respective branches, would clearly be constitutional, and would involve the omission of purely procedural steps. It is interesting to note that many States, as well as the Federal Government, have introduced systems of executive budgets without any constitutional amendment at all, and that the State of New York had an executive budget system dependent solely upon statute in 1927 and 1928, during the period intervening between the adoption of the Reorganization Amendment (Article V) and the going into effect of the Budget Amendment adopted in 1927 (Article IV-A).[34]

Whilst the constitutional amendments adopted in five States since 1916 providing for executive budgets, and the legislative provisions in twenty-eight other States adopting similar systems without constitutional amendment,[35] are undoubtedly steps towards better direction and management of state finances, they will probably have to be supplemented ultimately by more effective curtailment of legislative initiative in financial matters. For example, the amendment adopted in the State of New York in 1927 leaves the door open to many of the

[34] State Departments Law (Laws of N. Y., 1926, ch. 343), §§33-41; Laws of N. Y., 1926, ch. 758, §3; Laws of N. Y., 1927, ch. 131, §1.

[35] Public Budgeting (1929), by A. E. Buck, pp. 571-2.

abuses and encroachments of the past, for it expressly authorizes the legislature not merely to strike out or reduce any items proposed by the Governor in his executive budget bills, but to add new items of its own initiation provided only that they are stated separately and distinctly from the original items of the Governor's bill and refer each to a single object or purpose. The legislature is also at liberty, after it has finally acted upon the budget bill or bills proposed by the Governor, to initiate and pass appropriation bills for any purposes whatever, and even for the very same objects as the items which it has stricken from the Governor's budget bill or bills.

The practice of the British House of Commons under its self-denying rule above quoted has a lesson worthy of careful study by Americans. Our state legislatures could be given ample check upon extravagance, improvidence, or waste on the part of the executive branch by retaining power to reduce or strike out appropriations proposed by the Governor, such as is exercised by the British House of Commons, and the entire responsibility for appropriations as well as the entire accountability for their due expenditure could be cast upon and centered in the Governor and the heads of the state departments appointed by and responsible to him. It is believed by many competent students of government that the constant and alarming increase in appropriations in nearly all of our legislatures will never be effectively checked and controlled, economy secured, and extravagance and waste—frequently of immense sums—prevented, unless some adequate constitutional limitation upon legislative

initiative be adopted in the vitally important matter of the initiation of appropriations.

But whatever may be the sound and scientific view as to the nature of the power of initiating appropriations of public funds, the practice of Congress and of our state legislatures has been altogether too long established and is too well fortified by precedent and tradition as a legislative function to permit of any effective check or limitation except by express constitutional provision. An entirely different question, however, arises in connection with the expenditure of appropriations when once made by the legislature. The making of expenditures for the purpose of carrying on the executive branch of government has almost invariably been committed to that branch, and it ought to be regarded as essentially an executive or administrative function.

Recent constitutional amendments in the State of New York.

A constitutional amendment known as the Reorganization Amendment (Article V) was adopted in the State of New York at the general election held in November, 1925. This amendment, as modified in 1927, is printed at length in the appendix. It provided for a reorganization of the State Government with the avowed purpose of centralizing power, responsibility and accountability and securing economy and efficiency; and it was substantially in the same form as the provision proposed by the Constitutional Convention of 1915. Instead of an executive or administrative control divided—or rather scattered and overlapping—among more than one hundred

and fifty more or less independent and unco-ordinated departments, bureaus, boards, commissions and other agencies, the constitutional amendment established a system of centralized control, which was to be vested in a limited number of executive or administrative departments. The amendment was dictated by a sound principle of government, and had become necessary because of the generally conceded inefficiency, confusion, extravagance, and waste of the then existing system. Its purpose was to concentrate duties and responsibilities and to make the Governor, in fact as well as in name, the head of the executive branch of the State Government. It gave substantial and practical effect to the long existing provision of Article IV, contained in every New York State Constitution since the first of 1777, which vested the executive power of the State in the Governor. In 1925, however, for the first time in the history of the State, power was vested by the Constitution in the Governor to appoint the heads of all civil departments and all the members of the boards and commissions mentioned in the amendment by and with the advice and consent of the Senate, and to remove them in a manner to be prescribed by law, excepting two elective officers, namely, the Comptroller, who was to be the head of the Department of Audit and Control, and the Attorney-General, who was to be the head of the Department of Law, and excepting also the head of the Department of Education, the head of the Department of Agriculture and Markets, and members of temporary commissions for special purposes. Twenty civil departments of the State Government were prescribed by this constitutional amendment; and it was

provided that no new departments should be created, but that the legislature might reduce the number of these departments by consolidation or otherwise, or create temporary commissions for special purposes. It was further provided in section 3 as follows: "At the session immediately following the adoption of this article the legislature shall provide by law for the appropriate assignment, to take effect not earlier than the first day of July, one thousand nine hundred and twenty-six, of all the civil, administrative and executive functions of the state government, to the several departments in this article provided. Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards or commissions continued or created under this constitution, and increase, modify or diminish their powers and functions. No specific grant of power herein to a department shall prevent the legislature from conferring additional powers upon such department. . . ."

The Reorganization Amendment so adopted in 1925 confirmed, if indeed it did not give fuller force and effect to, the principle of the separation of powers, by expressly making it the duty of the legislature to assign "all the civil, administrative and executive functions of the state government, to the several departments in this article provided." In no other constitution, state or federal, is there any equivalent specific separation of powers or equivalent vesting of "all the civil, administrative and executive functions" in the executive department, not even in the famous provision of the Massachusetts Constitution of 1780, or in the amendment thereto (Article LXVI) adopted in 1918.

The Executive Budget Amendment (also printed in the appendix), however, was not adopted until 1927, two years after the Reorganization Amendment, although it was proposed by the Constitutional Convention of 1915 as essentially complementary to the Reorganization Amendment; just as the latter amendment was regarded as similarly complementary to the Executive Budget Amendment and as essential to any effective and satisfactory working of an executive budget system.[36] Both amendments were contained in the Constitution proposed by the Constitutional Convention of 1915 as integral parts of the general scheme of revision then submitted and recommended, and both are now embodied in the New York State Constitution, as Articles IV-A and V.

The Executive Budget Amendment is substantially in the form prepared by the Convention of 1915 except for a provision authorizing the legislature to add items of appropriation to any budget bill proposed by the Governor. It provides in careful detail for an executive budget, which is to be annually prepared by the Governor and submitted by him to the legislature, and is to contain a complete plan of proposed expenditures and estimated revenues and to be accompanied by a bill or bills for all proposed appropriations and reappropriations. It also provides that "the legislature may not alter an

[36] The report of the Reconstruction Commission of 1919, entitled "Reorganization in the State Government", declared (p. 316) that "the executive budget is based upon the theory of administrative consolidation. It therefore presupposes the reorganization of the state administration so as to fix definite responsibility in the Governor."

appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose."

In the address to the People of the State issued by the Constitutional Convention of 1915 over the signature of its distinguished President, Mr. Elihu Root, it was explained that the Executive Budget Amendment sought to substitute responsible for irresponsible government, and appropriations based upon thorough investigation and comprehensive information and framed in the light of informed public discussion, for the then existing complex, irresponsible system of legislation, often by secret conference in committee and hurried enactment, and it was declared that the Convention believed that these provisions would lead to the elimination of many useless and improvident expenditures, and result in a greater economy in the administration of the finances of the State.

The Constitutional Convention fully appreciated the importance of curtailing legislative initiative in appropriations; but it believed, and was willing to rely upon the assumption, that the power of the legislature in this respect was not likely to be abused, and that no attempts would probably be made to supersede the Governor's budget by wholesale substitutions of legislative initiation. It is, however, important to note that the Convention did not propose to allow the legislature to add items of appropriation to any budget bill proposed by the Governor, differing in this vital respect, as above stated, from the

amendment as finally adopted in 1927. The Report of its Committee on State Finances, Revenues and Expenditures stated as follows:[37]

"Your Committee has very carefully considered this difficult question [of the relation of the Governor's budget to other financial legislation]. On the one hand, it is essential to the success of the whole system that the Governor's budget, when presented, be given a fair trial and that it be considered on its merits without the easy temptation to the Legislature to throw it aside and begin over again a new budget of its own; on the other hand, your Committee believes that, particularly when a new system is thus being introduced, the Legislature should retain not only adequate power to correct executive abuses, but the right to initiate financial legislation by methods which will not disrupt the budget.

"The amendment which your Committee presents, therefore, provides that the Legislature, in acting upon the budget, may reduce or strike out but not raise the items therein. It thereby applies to the proposed bill the old self-denying ordinance of parliamentary procedure above mentioned. To leave in the Legislature the right to raise those items would, as your Committee believes, leave the door open to an entire abandonment of the system and an immediate return to present methods and would also tend to destroy all incentive on the part of the Governor to prepare the budget carefully in advance and present it with a sense of responsibility. But to meet the objection that the Governor might misuse his

[37] Documents of the Constitutional Convention of the State of New York, 1915, No. 32, p. 18.

power and either starve objects which the Legislature deems worthy or trade with individuals or localities, the power of initiation of financial legislation is left with the Legislature subject to but two restrictions:

"(1) It must not be exercised until after the budget is disposed of by both houses; and

"(2) Such appropriations must be made by separate bills, each for a single work or object.

"We believe that this will adequately protect the budget system and yet keep it free from executive abuse."

But no such protection was embodied in the final form of Article IV-A as proposed by the New York legislature, and finally adopted by the electorate in November, 1927, and the amendment now expressly authorizes the addition by the legislature of items of appropriation to any budget bill proposed by the Governor.

The Executive Budget of 1929.

The first executive budget under this constitutional amendment (Article IV-A) was submitted to the New York Legislature by Governor Franklin D. Roosevelt in January, 1929, and it was accompanied by a bill for all the appropriations and reappropriations proposed by him. The legislature thereupon struck out two hundred and fifteen items from the Governor's budget bill, namely, four items for the Department of Law, aggregating $1,146,070.93, one item of $2,729,000 for the Department of Labor, and two hundred and ten items aggregating $17,766,910 for the construction of state works and buildings, and substituted in their place two hundred and fourteen items aggregating $22,602,980.93, thereby reducing the appropriations for the Labor Department by $29,000, and increasing the construction items by $990,000. Most of the construction items substituted by the legislature were identical with those proposed by the Governor. All of the two hundred and fourteen items added or substituted by the legislature were vetoed by the Governor. He then submitted two supplemental budget bills presenting in alternate forms his proposed appropriations for these two state departments and for construction. One of these bills was acted on, amended and passed by the legislature; the other was not acted on by it at all, but was practically disregarded and died in committee.

The supplemental budget bill submitted by the Governor which was acted on by the legislature was the subject-matter of the subsequent litigation discussed below. As submitted by the Governor, it contained two hundred and seventeen separate items of appropriation for the maintenance and operation of the Department of Law, amounting in the aggregate to $1,146,070.93; five hundred and ninety-nine separate items of appropriation for the Department of Labor, amounting in the aggregate to $2,700,000, and two hundred and eleven separate items of appropriation for the construction of state buildings and works, divided among eight state departments and amounting in the aggregate to $18,756,910.

The legislature struck out all of the eight hundred and sixteen separate items proposed by the Governor for the Law and Labor Departments, and substituted in their place three lump sum appropriations, two for the Law

and one for the Labor Department, but in each case for amounts exactly equal to the total of the items of detailed appropriations proposed by the Governor. However, these lump sum appropriations were so phrased by the legislature that, as intended by it, they should become subject to section 139 of the State Finance Law, which provided as follows:

"§139. Segregation of lump sum appropriations. When, by act of the legislature, a state department is created or reorganized, or state departments consolidated, or a board, commission, division or bureau within a department is created or reorganized, and a lump sum is appropriated for its maintenance and operation, or for personal service, during the first fiscal year thereafter, no moneys so appropriated shall be available for payments for personal service, except temporary service or day labor, until a schedule of positions and salaries shall have been approved by the governor, the chairman of the finance committee of the senate and chairman of the ways and means committee of the assembly, and a certificate of such approval filed with the comptroller."

None of the Governor's two hundred and eleven proposed items for construction aggregating $18,756,910 (except one of $200,000 for a state armory at Utica) were stricken out by the legislature, but, on the contrary, were passed by it, and twenty-one new items of construction added, aggregating $2,112,500, making a total for construction items of $20,669,410. However, a clause was then added by the legislature to the Governor's bill applicable to all construction items, which read as follows:

"§11. No part of any appropriation made by this

act for construction shall be expended for personal service except on the approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee. This provision may be complied with by the filing with the comptroller and the department of civil service of a list of the positions so approved and the time for which any person may be employed in such position. This provision, however, shall not apply to personal service employed by a contractor, by an institution on construction work done under special fund estimate, by an interstate commission or on highways."

In the above quoted enactments (*i.e.*, sections 139 and 11, respectively) the Governor was joined with the two legislative chairmen; but this did not in any way affect the control of the legislative officers, for whether a majority of the three designated officers could act, or all three had to concur, the result was the same: the two legislative chairmen in either aspect controlled the expenditure of each appropriation. In a word, without their approval not a dollar of these appropriations could be made available or expended, and they were thereby placed in a position practically to control the conduct of the respective offices affected.

Several separate bills were passed by the legislature at the 1929 session providing for appropriations which amounted in the aggregate to nearly $10,000,000;[38] and in most of these appropriations the control of their expenditure was sought to be vested in a body or commission of

[38] Laws of N. Y., 1929, chs. 93, 364, 405 and 458.

which legislative officers constituted a majority, thereby *pro tanto* encroaching upon the functions of the responsible heads of the several civil departments of the State Government.

The result was that the legislature of the State of New York, at its 1929 session, assigned or committed to its own members control of the segregation or expenditure of appropriations amounting in the aggregate to $31,955,572.80, with all the administrative control and patronage that such a power necessarily involved.

It should be added that this practice of the legislature, in vesting control of the expenditure of appropriations in its own members and officers *ex officio*, first originated in 1920, and had been annually followed for ten years. During the one decade, control of appropriations amounting to the total of $464,242,677 had been thus assigned to legislative members.[39] A practically permanent method had been established by the New York legislature, which, if valid, was illimitable in its possibilities of encroachment upon the functions of the executive departments, and which in effect created an

[39] The yearly totals of appropriations controlled directly or indirectly by the two chairmen or other members of the Legislature were $500,000 in 1920, $32,682,450.95 in 1921, $28,114,088.65 in 1922, $40,251,462.67 in 1923, $41,401,206.80 in 1924, $41,888,384.30 in 1925, $142,518,107.76 in 1926, $56,428,539.29 in 1927, $48,295,664 in 1928, and $31,955,572.80 in 1929, making a grand total of $464,242,677 for the ten years 1920-1929, both inclusive. The statutes were as follows: Laws of N. Y., 1920, chapter 8; Laws of N. Y., 1921, chapters 176, 336, 337, 340, 579, 650; Laws of N. Y., 1922, chapters 106, 128, 319, 397, 402, 405, 643; Laws of N. Y., 1923, chapters 1, 54, 55, 225, 342, 450, 668, 684, 854; Laws of N. Y., 1924, chapters 70, 140, 143, 146, 147, 153, 173, 225, 360; Laws of N. Y., 1925, chapters 181, 208, 216, 224, 487, 557, 659; Laws of N. Y., 1926, chapters 5, 7, 16, 44, 211, 569, 571, 575, 628, 769, 774, 779, 786; Laws of N. Y., 1927, chapters 4, 10, 54, 55, 56, 58, 61, 77, 153, 346, 412, 415, 433, 435, 517, 520, 522, 570; Laws of N. Y., 1928, chapters 71, 75, 114, 430, 520, 555, 578, 624, 637; Laws of N. Y., 1929, chapters 93, 364, 405, 458, 593.

independent and in many respects a far-reaching and controlling department of the State Government.

The constitutionality of this practice by the legislature was directly presented for decision to the New York Court of Appeals in the recent *Executive Budget* case.[40] The final judgment entered in conformity with the opinion of the court adjudged that similar provisions in twelve separate statutes were unconstitutional and as such void and ineffective. The statutes so invalidated, in whole or in part, are set forth in a note.[41]

The principal constitutional questions of general interest which were presented to the court for consideration and decision may be briefly summarized as follows: (1) whether the statutes in question constituted civil appointments by the legislature of its own members in violation of section 7 of Article III of the State Constitution; (2) if the function of the segregation or expenditure of appropriations after they had once been made by the legislature could be regarded as legislative, then whether its exercise could be delegated to one or several of its own members, to be exercised by them *ex officio* on its behalf but in their own discretion; and (3) if such a function was executive or administrative, then whether its exercise could be assigned or committed by the legislature to its own members.

[40] *People* v. *Tremaine*, 252 N. Y. 27.

[41] Laws of N. Y., 1929, chapters 93, 364, 405, 458, 593; Laws of N. Y., 1928, chapters 71, 430; State Finance Law, §139; Education Law, §1046; Agriculture and Markets Law, §31c; Civil Service Law, §78; Public Lands Law, §40.

Civil appointments of members of the legislature.

The Constitution of the State of New York has long (*i. e.*, since 1821) expressly prohibited a member of the legislature from receiving any civil appointment within the State from the Governor, the Governor and Senate, or the Legislature. The provision is contained in section 7 of Article III, and it reads as follows:

"§7. Member of legislature not to hold other civil office.

"No member of the Legislature shall receive any civil appointment within this State, or the Senate of the United States, from the Governor, the Governor and Senate, or from the Legislature, or from any city government, during the time for which he shall have been elected; and all such appointments and all votes given for any such member for any such office or appointment shall be void."

In order to ascertain whether the several matters assigned by the statutes in question to members of the legislature constituted civil appointments within the intent and meaning of this constitutional provision, it will be necessary to analyze the functions and duties so assigned.

The supplemental budget bill submitted by Governor Roosevelt was amended by the legislature[42] so as to vest the control of the expenditure of appropriations aggregating $24,533,280.93 in the two members of the legislature who were then serving respectively as Chairman of the Senate Finance Committee and Chairman of the Assembly Ways and Means Committee. Thus, the legislature amended the supplemental budget bill submitted by

[42] Laws of N. Y., 1929, ch. 593.

the Governor so that no part of the appropriations of $3,846,070.93 for carrying on the Law and Labor Departments was to "be available for payments for personal service, except temporary service or day labor", until these two legislative members and officers had first approved "a schedule of positions and salaries . . . and a certificate of such approval [had been] filed with the Comptroller." The Governor included in the budget bill an item of appropriation of $17,800 for expert and temporary services in the Bureau of Housing of the Department of Public Works. The legislature approved this item, but added thereto a clause providing that before any liabilities should be incurred with respect to this item a detailed segregation thereof had to be approved by the two legislative chairmen. And, under section 11, added by the legislature as above quoted, "no part of any appropriation made by this act for construction shall be expended for personal service" by the several (eight) state departments affected without the like approval of the two legislative chairmen.

Chapter 93 appropriated $3,800,000 for the construction of state office buildings in the cities of New York and Buffalo, and provided that the moneys so appropriated should be expended by and under the direction of a commission called the State Office Site and Building Commission, consisting of seven members appointed by the legislature itself, of whom four, or a majority, were members and officers of the legislature, viz.: the Temporary President of the Senate, the Speaker of the Assembly, the Chairman of the Finance Committee of the Senate and the Chairman of the Ways and Means Committee of

the Assembly, and three, or a minority, were executive officers, viz., the Governor, the Superintendent of Public Works, and the State Architect. The act appropriated $3,500,000 for the acquisition of land and the construction of a new state prison, and this appropriation likewise was made subject to the control of the same commission by reference to chapter 56 of the Laws of 1927. The same act (section 14) further attempted to vest in the two chairmen authority to transfer from one item to another of appropriations made by the act any amount which might be found unnecessary to complete the object for which it was appropriated, and necessary for a different object for which an appropriation was made by the act.

Similarly, chapter 364 made an appropriation of $50,000 for the "expenses, including personal service and maintenance" of the Department of Taxation and Finance, chapter 405 an appropriation of $52,091 "for the purpose of furnishing proper terminals and facilities for barge canal traffic", and chapter 458 an appropriation of $20,200 to the Education Department "for personal service in connection with the reinstatement and continuance of teachers' training classes" at three state schools of agriculture; and these three appropriations, aggregating $122,291, were similarly made subject to the control of these two legislative chairmen.

In other words, to these two members of the legislature, serving *ex officio,* were assigned the following functions and duties: (1) under chapter 593, the approval of the segregation of appropriations aggregating $24,533,280.93 for the maintenance and operation of the Law

and Labor Departments, personal service in the Department of Public Works, and personal service in connection with appropriations for construction to eight separate state departments, (2) under chapter 364, the approval of the segregation by the Department of Taxation and Finance of an appropriation of $50,000 for expenses in the collection of a tax, (3) under chapter 405, the approval of the expenditure by the Department of Public Works of an appropriation of $52,091 for terminals and facilities for barge canal traffic, and (4) under chapter 458, the approval of the segregation by the Department of Education of an appropriation of $20,200 for teachers' training classes. And to the State Office Site and Building Commission, constituted as aforesaid of a majority of legislative members serving *ex officio,* was assigned and committed the function of expending $7,300,000 in the construction of public buildings and the acquisition of land for and construction of a new state prison.

All the Judges of the Court of Appeals except Judge Crane concurred in holding that the assignments or committals of these powers and functions to the two legislative chairmen amounted to civil appointments within the intent and meaning of the constitutional provision quoted above; but the holding was unanimous as to the State Office Site and Building Commission. Discussing the question as to the nature of these appointments, Judge Pound, for the majority of the court, said:

"The words 'any civil appointment' as thus used are very broad and include any placing in civil office or public trust pertaining to the exercise of the powers and

authority of the civil government of the State, not reasonably incidental to the performance of duties of a member of the Legislature, as distinguished from a military office or a mere employment or hiring on contract, express or implied (*State ex rel. Barney* v. *Hawkins,* 79 Mont. 506, 53 A. L. R. 583, and notes). The duties of members of the Legislature may be enlarged without making a civil appointment or creating a new office, so long as the duties are such as may be properly attached to the legislative office (*Shoemaker* v. *United States,* 147 U. S. 282), but the importance of the office is immaterial if the appointment is administrative or judicial in character. The prohibition is absolute and unqualified and in analogous cases has been ruthlessly enforced . . . The chairmen of the two committees 'discharge duties, not for his [their] own benefit, not for the benefit of private individuals, but for the public.' They are, therefore, public officers (*People ex rel. Sherwood* v. *State Board of Canvassers,* 129 N. Y. 360) and public officers vested with great powers to act as a check on the expenditure of lump sum appropriations.

"Obviously the prohibition of the Constitution applies equally when a member of the Legislature receives a civil appointment *ex officio,* as chairman of a committee and when he is appointed by name. Otherwise it would be possible, except for the recently amended article V of the Constitution, for the Legislature to provide, *e. g.,* that the Chairman of the Senate Finance Committee should be *ex officio* the State Superintendent of Banks, and to distribute offices to their own members by description rather than by name. No such evasion of the letter and spirit of the Constitution could be tolerated.

"That the designation of the Chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee to approve the segregation of lump sum appropriations amounts to the making of civil appointments by the Legislature cannot be seriously disputed. The positions are created and filled by the Legislature; the incumbents possess governmental powers; the powers and duties of the positions are defined by the Legislature; such powers and duties are performed independently; the positions have some degree of permanency and continuity. Their power is not exhausted by a single act but is a general supervisory power over a large group of appropriations, amounting to nearly nine million dollars, to be exercised whenever the occasion arises . . . Their appointment was on behalf of the government in a station of public trust not merely transient, occasional or incidental . . . If all this does not amount to a civil appointment, it is hard to see what more is required."

Judge Crane in his opinion took a different view of this constitutional provision. His conclusion was that the term "any civil appointment" meant only appointment to public office; that the assignment to members of the legislature of the power of segregation or approval and control of the expenditure of appropriations did not constitute such an appointment; that it invested them only with a temporary power not rising to the dignity of a place or office, and that such power was merely

a detail of carrying out and effectuating the appropriation made, and hence transient, occasional, or incidental.

Obviously, Judge Crane's point of view presented a fundamental and grave difference of opinion between the majority of the court and himself as to the meaning of the term "any civil appointment". He fully recognized the magnitude and extent of the power assigned, and he declared that it was "immense and in its full exercise may be so arbitrary as to make the Legislature, through its committees or its single member, control every executive department [and] . . . carries with it the power to run the office;" but he could not agree that this constituted a civil appointment. He nevertheless recognized that inasmuch as the legislation in question assigned important and far-reaching administrative functions and control to members of the legislature, it was illegal, because in violation of the principle of the separation of powers.

It should be observed that the language of this important constitutional prohibition (Article III, section 7), as pointed out by Judge Pound (at p. 41) is "absolute and unqualified and in analogous cases has been ruthlessly enforced." Plainly, it prevents any civil appointment by the legislature of one or more of its own members. The word *civil* was used in contradistinction to *military,* as appears by reference to the proceedings of the Constitutional Convention of 1821,[43] and it may reasonably be deemed highly probable that the word *appointment* was employed instead of the word *office,*

[43] Clarke's Debates and proceedings of the Convention of 1821, pp. 85-7; see also I Story on the Constitution, §791.

because it was a broader and more comprehensive term, and would inhibit any appointment whatever that could be classified as civil whether or not it constituted a public office. The final clause "office *or* appointment" strongly tends to support this view.

The court, however, was unanimous in holding that the statutes assigning the functions above described to the State Office Site and Building Commission constituted civil appointments within the intent and meaning of the constitutional prohibition, and consequently that they were unconstitutional and void.[44] The functions assigned by eighteen separate statutes to four members and officers of the legislature—as a majority of the Commission—were found to be administrative in their nature and to have created a department of the State Government substantially permanent in its functions. Reference to these statutes, which are cited in a note,[45] will show the broad character and extent of the powers and duties so conferred upon members of the legislature. During the four years of the existence of the Commission, its members had been vested by the legislature with control over the expenditure of appropriations aggregating $20,444,000.

It is, of course, manifest that the ruling that the legislation in question was in conflict with the constitutional prohibition against a member receiving from the legislature any civil appointment "during the time for which he shall have been elected", was sufficient to dispose of the whole controversy before the court and to invalidate

[44] 252 N. Y. at pp. 45-6, 51-2, 64.

[45] Laws of N. Y., 1926, chapters 5, 63, 615, 616, 639; Laws of N. Y., 1927, chapters 4, 10, 54, 56, 58, 61, 77, 346, 415; Laws of N. Y., 1928, chapters 71, 114, 430; Laws of N. Y., 1929 chapter 93.

the various statutory provisions of which the validity was being challenged; but both Judge Pound and Judge Crane in their opinions proceeded to discuss additional constitutional aspects. This discussion cannot be characterized as *obiter dicta,* and its importance and effect thereby minimized, for the questions were distinctly presented for adjudication; they were fully argued; the court carefully considered them, and it was entirely warranted in expressing its opinion thereon, if it concluded that it was fitting for it to do so.[46] At any rate, views so expressed must have great weight hereafter in the consideration or decision of the questions thus discussed.

The delegation of legislative power.

Assuming, but only for the purpose of argument, that the segregation of appropriations or the approval and control of their expenditure after they have been duly enacted by the legislature could, in any accurate or proper sense, be classified as involving the exercise of legislative functions, the question would be presented whether the legislature could delegate the exercise of such functions to one of its committees or one or a few of its own members, to be performed by them *ex officio* according to their independent judgment and discretion and not subject to approval or ratification by the legislative body itself.

Although the legislature, acting as a body, can indisputably segregate appropriations and prescribe the manner of their expenditure in such detail as to it may seem

[46] *Railroad Companies* v. *Schutte,* 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Co.,* 199 U. S. 160, 166; *O'Brien* v. *Union Central Life Ins. Co.,* 207 N. Y. 180, 187.

desirable, it does not at all follow that it may delegate or assign such a legislative function to a commission or committee constituted in whole, or as to a majority, of its own members, as in the New York legislation in question, to be exercised according to their independent judgment or discretion.

Where the legislative power of a State is by its Constitution expressly vested in a Senate and Assembly of two hundred members, as in the State of New York, it ought to be evident that such power cannot be delegated to a few of the members. The well-known maxim *"Delegata potestas non potest delegari"* has wide application in the construction of our constitutions.[47] Under the New York Constitution, for example, members of the legislature are elected only to perform legislative duties and to act as part of a legislative body, whether in the Assembly or the Senate, and it is expressly provided that in passing appropriation bills, the legislature must act with the assent of a majority of the members elected to each branch and at sessions having a quorum of at least "three-fifths of all the members elected to either house" (Article III, sections 15 and 25).

This question involves much more than the mere function of segregating appropriations, or approving or controlling their expenditure, for it reaches into the whole field of those functions which the legislature may either itself regulate by detailed enactment, or in its discretion assign or commit to other departments. If it were held that the legislature could elect neither to exercise a par-

[47] *Hampton Co.* v. *United States,* 276 U. S. 394, 405.

ticular function itself as a body "by the assent of the majority", nor assign its performance to the executive or judicial department, but to commit its exercise to one of its committees or to one or a few of its own members as its agents and representatives, this would permit the creation of offices or departments of the State Government not at all authorized expressly or impliedly or contemplated by the State Constitution and not subject to the limitations and safeguards applicable to action by the legislature or to action by the executive and judicial departments. Legislators, as agents and representatives of the legislature, would then in effect be independently exercising legislative functions according to their own individual judgment or discretion and not in accordance with the judgment, discretion and assent of a majority of the elected members. Thus, for example, rate-making is a function that could be exercised by the legislature itself, although commonly assigned to the executive branch. Similarly, the legislature may and does assign to the Tax, Labor, Health, and other state departments, the power to formulate administrative regulations. But the legislature could not, of course, constitutionally declare that inasmuch as rate-making and rule-making generally are legislative functions, in the sense that they could indubitably be exercised directly by itself, the exercise of these powers might therefore be assigned directly or indirectly to the chairmen of its various committees dealing with these subjects. Otherwise, the legislature could make the chairman of its committee on banking, for all practical purposes, the Superintendent of Banks; it could in effect replace the Public Service Commission

and the Transit Commission with its own committee; and, indeed, it could delegate to individual members supervision, if not practical control, of the execution of almost every law and of almost every executive or administrative function.

In Cooley's Constitutional Limitations, the author states the rule as follows:[48] "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

And in Black's Constitutional Law, it is said:[49] "Legislative committees play an important if not an essential part in the modern conduct of legislative business; and while of course no law-making body could surrender or delegate its powers to its own committees, these are exceedingly useful in framing rules, investigating the various subjects of proposed legislation, drafting bills, and recommending the enactment of laws."

Long before our American system of constitutional

[48] Eighth ed., p. 224.
[49] Third ed., p. 343.

law was established, John Locke laid down the principle (Essay on Civil Government, section 142) as follows: "Fourthly, the legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."

In the *Executive Budget* case,[50] Judge Pound, writing for the court, discussed this aspect of the enactments in question, that is, the delegation of legislative power to members of the legislature, in the following language: "If they are legislative in character the appointment amounts to a delegation of the legislative power over appropriations. The Legislature cannot secure relief from its duties or responsibilities by a general delegation of legislative power to someone else. (*People* v. *Klinck Packing Co.*, 214 N. Y. 121.) The power to itemize legislative appropriations is a legislative power which it may exercise if it sees fit as long as the matter is in its hands. If the power to approve the segregation of lump sum appropriations may be delegated to any one, even to one or two members of the Legislature, it necessarily follows that the power to segregate such appropriations may also be conferred upon such delegates. The conclusion would then be inevitable that the Legislature could make lump sum appropriations and delegate the power to two of its members to segregate the same, not only within a department but among departments. To visualize an extreme case, one lump sum appropriation might be made to be segregated by the committee chairmen. Such a delegation of legislative power would be abhorrent to all our notions of legislation on the matter

[50] *People* v. *Tremaine*, 252 N. Y. at p. 44.

of appropriations. It would amount to a casting on others of a great measure of legislative responsibility assumed by the members themselves by their oath faithfully to discharge the duties of their office."

And Judge Crane, whilst declaring that the question of the delegation of legislative power was not in the case, nevertheless said: "The power of the Legislature over appropriations is plenary unless restricted by the State Constitution. It may not delegate its powers to make appropriations. It may not make a lump sum appropriation for the public needs and authorize one of its members to divide it up as necessity requires. This is simply making an appropriation; acting for the Legislature; a delegation of its powers to the individual. No one questions this."

Hence, it is fairly apparent that both the majority and minority opinions concurred in recognizing that if and so far as the particular function of the segregation of appropriations could be regarded as legislative, its exercise could not be delegated by the legislature to one or a few of its own members.

The exercise by members of the legislature of executive or administrative functions.

The New York Court of Appeals found no difficulty in classifying the functions assigned to members of the legislature in and by the statutes above mentioned as in their nature clearly executive or administrative.[51]

[51] Cf. The Federalist (No. 72); *Brown* v. *Honiss*, 74 N. J. L. 501, 521; *State* v. *Zimmerman*, 197 N. W. 823, 827; *McElderry* v. *Abercrombie*, 213 Ala. 289, 290; *Abbott* v. *Commissioners of Fulton County*, 160 Ga. 657, 664; *Board etc., Commrs.* v. *Riley*, 194 Calif. 37, 49; *Arnett* v. *State ex rel. Donohue*, 168 Ind. 180, 186-7; *State ex rel. Tolerton* v. *Gordon*, 236 Mo. 142.

It was unanimous upon this point. Judge Pound declared that "the duties here assigned to the legislative chairmen are administrative duties and are not mere incidents of legislation"; that "the distribution of administrative functions to members of the Legislature, rather than to the constitutionally created civil departments, is thereby [*i. e.*, by Article V] prohibited", and that "the legislation here questioned distributes administrative functions of an important and general nature in a manner not provided for by the Constitution. . . . The whole body of departmental duty is continuous and if the parts may be separated into the temporary and special acts which go to make up the whole, all the powers of a constitutionally created administrative department may be shorn from it and distributed to temporary commissions to be renewed from year to year and the basic purpose of the amendment thus set at naught. At least it may be safely said that the provisions of article V could be completely nullified if the Legislature might withdraw from the departments thereby created the functions assigned to them by law and confer them upon its own members."

Judge Crane, in his concurring opinion, was equally positive. He declared (at pp. 56, 58) that "when a member of the Legislature is clothed with the duty of segregating lump sum appropriations he ceases to act as a legislator and is performing executive duties, administrative functions, which under our form of government is illegal. . . . In my judgment, the Legislature has attempted to place the administrative work of supervising an administrative office upon a member of the Legislature, giving to him powers which he was not elected to assume. That the Legislature is supreme in the matter of making appropriations and controlling the revenue is a fundamental of government. This control no one challenges. The question is whether, after having made an appropriation, having authorized an expenditure, the Legislature can follow it up and through a committee or a single member aid or control the manner in which the appropriation shall be disbursed. In the instances before us the Legislature has appropriated millions of dollars and yet restricted its expenditures to an approval by two of its members. This approval must be obtained before the lump sum appropriation is segregated, which means, of course, that these legislators have a control and a power over the administrative office or officer to whom the appropriation or for whom the appropriation has been made. These legislators must be consulted and their consent obtained as to the number of employees or the amount of expenditure for supplies or other matters that may be requisite for the doing of the work. The legislator thereupon in reality becomes a part of the administrative office; he functions as an administrator responsible for the due performance of the work. Performance of administrative work depends upon help. The kind and nature of the help, or, in other words, the efficiency required for the performance of the work, rests with the approval or disapproval of these members of the Legislature.

"The power is immense and in its full exercise may be so arbitrary as to make the Legislature, through its committees or its single member, control every executive department."

Nor was this conclusion as to the essential character of the functions in any way affected by the fact that the legislature might itself have itemized the appropriations instead of enacting them in the form of lump sums. When the legislature itself itemizes an appropriation, the nature or character of the function it thus performs is essentially law-making and different from the nature of the function that an executive or administrative officer performs when the duty of executing or carrying out the law by segregating an appropriation is assigned or committed to him. The result, it is true, may be exactly the same, but the nature of the function exercised is different: the one is legislative, *i. e.*, law-making, and the other is executive or administrative, *i. e.*, executing, administering, or enforcing a law enacted by the legislature. Stated in other words, the executive or administrative officer to whom the duty of segregation or expenditure may be assigned or committed is in no sense whatever making a law, but is executing or carrying out, obeying and filling in the administrative details of a law emanating from the legislature. This is of the very essence of executive or administrative action.

It is elementary that it is the function and constitutional duty of the executive department to carry out the laws, or, as phrased in the New York Constitution, to "take care that the laws are faithfully executed" (Article IV, section 4). No reason exists why this duty should not extend to the execution and carrying out of budget or appropriation laws equally with other laws. The function of segregating lump sum appropriations in a budget or appropriation bill becomes part of the process of executing and carrying out a law, as distinguished from the process of enacting it; and it does not differ in kind inherently from the execution of any other kind of law which vests discretionary powers in an executive or administrative officer or body. The legislature has done its part and exercised its function by making the appropriation and specifying the general object or purpose for which it is to be employed. The exact designation of the details of the expenditure—the determination of the precise amount to be given to each office or employee—the methods and services to be provided for—the supervision of the innumerable minutiae of administration involved in the segregation and expenditure of any substantial appropriation—thereupon become the function and responsibility of the executive or administrative branch.

The crucial question directly presented to the New York Court of Appeals under the several enactments vesting power in members of the legislature was, therefore, whether under the New York Constitution the legislature could assign executive or administrative functions to one or a few of its own members and officers acting *ex officio;* that is to say, whether such members and officers could be empowered to perform executive or administrative functions while at the same time acting as members and officers of the legislature. Judge Pound laid down the fundamental rule that the three powers—executive, legislative and judicial—"ought to be kept separate", and declared that "they are kept separate by the New York Constitution (Art. III, §1) which provides: 'The legislative power of this state shall be vested in the senate and assembly,' and article IV, section 1, which

provides: 'The executive power shall be vested in a Governor.' '' In a later part of his opinion, Judge Pound referred to the new Article V adopted in 1925, and said: ''The purpose of the amendment was greatly to reduce the number of State departments and boards and to confine the distribution of all civil administrative functions, not temporary and special, to the departments enumerated in the Constitution (Art. V, §2, *supra*) and to vest the appointment of department heads, so far as may be, in the Governor. (Art. V, §4.) The duty of reorganization thus imposed was performed by the Legislature of 1926, by laws effective on January 1, 1927. The distribution of administrative functions to members of the Legislature, rather than to the constitutionally created civil departments, is thereby prohibited. The Legislature may create no departments or boards other than those named in the article, except as section 3 provides that it may create 'temporary commissions for special purposes.' The legislation here questioned distributes administrative functions of an important and general nature in a manner not provided for by the Constitution. The legislative policy as indicated is to renew this distribution of powers from year to year so that the attribute of general permanency attaches thereto. Although, under our ruling that section 11 is void, it is not necessary for the decision to pass definitely upon this question, it is clear that administrative functions other than those temporary in their character and special in their purpose, may be constitutionally bestowed only upon one of the civil departments of the State Government provided for in article V, section 2.''

Indeed, study of the language of Article V should be convincing that no provision could have been framed that would have more clearly and distinctly expressed the intent and purpose of its framers to prohibit the legislature from assigning any civil, administrative, or executive functions whatever to its own members and officers. The language commands that ''*all* the civil, administrative and executive functions of the state government'' shall be assigned to the state departments thereby provided for. Every one must have assumed—framers and people alike—that this comprehensive language covered the administrative function of the segregation or expenditure of appropriations after they had been enacted by the legislature. The framers were not called upon to go further and specify that the phrase ''*all* the civil, administrative and executive functions of the state government'' included particular functions, or to declare that the whole included all its parts.

Surely, it would not be reasonable to assume or believe that the Constitutional Convention of 1915 and the distinguished and experienced men who framed and for ten years advocated the adoption of the Reorganization Amendment, did not appreciate the nature and importance of the functions of the segregation and expenditure of appropriations made by the legislature whether in budget bills or otherwise, or overlooked the necessity of dealing with and covering these functions. It was undoubtedly contemplated that they would thereafter be assignable only to the constitutional state departments. The applicable rule was stated by Chief Justice Marshall

in the following language:[52] "It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

A statement is contained in Judge Pound's opinion (at p. 39) to the effect that "nothing in the abstract division of powers prevents the selection of members of the Legislature to fill such [administrative] offices." Yet, he apparently recognized that, aside from section 7 of Article III prohibiting civil appointments of its own members, and aside from the new Article V, the legislature could not confer administrative powers upon one or more of its own members *ex officio* to be exercised by them in their capacity as members of the legislature. Thus, he explicitly declared (at p. 43) that "the Legislature has not only made a law—*i. e.*, an appropriation—but has made two of its members *ex officio* its executive agents to carry out the law—*i. e.*, to act on the segregation of the appropriation. This is a clear and conspicuous instance of an attempt by the Legis-

[52] *Dartmouth College case*, 4 Wheaton, 518, 644-5.

lature to confer administrative power upon two of its own members. It may not engraft executive duties upon a legislative office and thus usurp the executive power by indirection (*Springer* v. *Philippine Islands*, 277 U. S. 189)."

Whether the principle of the separation of powers in and of itself forbids members of the legislative branch of our governments from receiving civil appointments or exercising administrative or judicial functions while at the same time continuing to serve as legislators, has heretofore received only limited and meagre consideration. This has been due undoubtedly to the fact that attempts to confer executive or administrative power on individual members of the legislature have usually been held invalid under constitutional provisions forbidding members of the legislature from holding any other civil office, or receiving any civil appointment. But it should logically follow, as a corollary to the principle of the separation of powers, that executive or administrative functions cannot be delegated by the legislature to its own members, or to commissions constituted of or controlled by them, to be exercised while they are continuing to serve as legislators. Certainly, as the principle is embodied in the New York Constitution, which expressly vests the executive power in the Governor and commands that "all the civil, administrative and executive functions of the state government" shall be assigned to constitutionally designated civil departments, a member of the legislature ought not to be eligible to service as an executive or administrative officer while still serving as a member of the legislature. He certainly is

not part of any civil state department. In final analysis, the real essence of the principle of the separation of the powers of government into the three branches is "that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants", as was pointed out by Mr. Justice Miller writing for the court in *Kilbourn* v. *Thompson,* 103 U. S. 168, 190.

Were the rule otherwise, the legislature could, by a very simple device, accomplish indirectly what it is generally admitted it could not or should not accomplish directly under the principle—*i. e.,* execute and carry out a law. An interpretation of the doctrine of the separation of powers that would permit the same men to serve in and dominate separate departments would permit the setting up of a system of mere paper or nominal separation of powers, and would afford scant protection against those ills which would inevitably spring from the union of diverse powers in the same hands, and which the system of the separation of powers was directly designed to prevent.

Judge Pound points out that prior to 1821 many administrative offices in the State of New York were filled by members of the legislature at the very time when they were serving in a legislative capacity. We recall, however, no instance in which members and officers of the legislature were appointed by it *ex officio* to exercise executive or administrative functions as part of a deliberate and systematic scheme to encroach upon and establish legislative control over the executive branch. Furthermore, whilst the essential principles of the doctrine of

the separation of powers were present from the very beginning of the history of the State of New York, and were contained in the first Constitution of 1777, the system that prevailed prior to the adoption of the Constitution of 1821 can only be considered as having given limited recognition to the doctrine. Separation was then only partial, and the intermingling of functions went far beyond anything that now would be deemed consistent with the present more completely developed system. For example, under the Constitution of 1777, members of the judiciary were on the "Council of Revision", and shared the veto power with the Governor, and the appointing power was vested in a "Council of Appointment", consisting of four senators chosen by the Assembly, acting together with the Governor. It was consequently under a mixed system—and one very different from that now prevailing—that members of the legislature were prior to 1821 frequently appointed to civil office. At any rate, the practice became so objectionable that the State Constitution was amended in 1821 in and by section 7 of Article III (then numbered section 10 of Article I) for the express purpose of preventing such appointments and commingling or overlapping of functions in the future.

Another ground of distinction between these early instances and the legislative practice involved and challenged in the *Executive Budget* case, lies in the fact that, in the case of the practice of the New York legislature which originated in 1920, much more was presented than a mere intermingling of departments dictated by considerations of practical convenience and governmental coordination. It might be argued that a certain degree of

interpenetration or overlapping between the personnel of the various branches of the government, not exercised in such a way or developed to such a degree as to constitute a substantial encroachment upon, or to impair substantially the independence of, the several branches (as, for example, service by members of the legislature in subordinate capacities under the heads of the regular executive departments of the State), might be tolerable as well as in substance consistent with the doctrine of the separation of powers and a "sensible approximation" thereto, or reasonable governmental co-ordination. Here, as elsewhere in this field, the law might reasonably ignore unimportant or purely technical violations, if the practices in question did not result in any substantial encroachment by one department upon the other, or any substantial impairment or subversion of the principle itself. But, whatever the courts might hold with reference to such a question, no similar condition was presented in the *Executive Budget* case. The legislature had itself year after year for ten years conferred administrative powers of the most extensive, far-reaching and controlling nature directly upon its own members *ex officio,* and the essential independence of the executive department was being thereby directly and systematically encroached upon and undermined. For if the legislature could not only appropriate money, but could stand guard over its minute expenditure, and dole out at its further discretion what it had in form already appropriated—acting through its own members and officers—with power vested in them at any moment to withhold or block the vital supply of funds necessary for carrying on the activities of the State

Government and the payment of personnel, then the legislature might for all practical purposes place its own members and officers in control of every executive department and run every executive office, and it might thereby reduce the executive department to an aggregation of routine clerks and minor officials, stripped of all real authority, discretion, and independence. No interpenetration or overlapping of personnel which had as its main purpose, or as its necessary practical result, such a direct and dominant control by the legislative department over the executive—so as, repeating the language of Judge Crane, to vest immense power which "in its full exercise may be so arbitrary as to make the Legislature, through its committees or its single member, control every executive department"—could be construed or accepted as sensible approximation or reasonable governmental co-ordination.

Conclusion.

The legislative practices involved in the *Executive Budget* case, which, as above shown, originated in 1920, constituted a new departure from the established financial procedure of over a century in the State of New York, and it continued during an exceptional period of reorganization of the State Government, when the legislative power for most of the time was in the hands of one political party and the executive power in the hands of the other. In one form or another, members of the legislature were thereby systematically encroaching upon the executive departments of the State Government and interfering with the maintenance, operation, and activities of

its various branches. If the court had upheld the exercise of this power as constitutional, it would, to repeat, have been illimitable, and dependent only upon the discretion or moderation of the legislature itself. The principle of the separation of legislative and executive powers would then in this respect no longer have had any real force and effect in the State of New York, for every department could have been thus controlled as to personal service or otherwise by means of appropriations made subject to the control of members of the legislature as to their segregation or expenditure.

In conclusion, it is submitted that the scientific development of budgetary reform and the economical expenditure of appropriations of public funds, which are becoming imperatively necessary, will ultimately depend in greatest measure upon the due application and enforcement of the principle of the separation of governmental powers, and protection thereunder against the "danger from legislative usurpations, which", as Madison warned in The Federalist,[53] "by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." Otherwise, it is reasonable to apprehend that there will inevitably be constant repetitions of such conflicts between the legislative and executive branches of government as have arisen during the past two years in the State of New York to the distinct prejudice of its best and permanent interests.

The centralization of responsibility for appropriations and the creation of safeguards to secure economy

[53] No. 48.

and prevent waste in their expenditure, as contemplated by the Constitutional Convention of 1915, are becoming supremely important in view of the alarming increase of the cost of government in the State of New York. The New York legislature appropriated $23,936,377 in 1900, and $317,649,406 in 1930, an increase of about 1230 per cent.[54] This ratio is far greater than any increase of wealth or population. The enormous increase in the course of only one generation certainly constitutes an admonition of financial danger, if not disaster. The people of the State hold the Governor responsible for the economical management of the State Government and for waste or extravagance in the handling of state funds by the several state executive departments. It would be manifestly improper and unjust to impose upon him this grave responsibility and yet allow a wholly different and practically irresponsible authority, acting through a few members of the legislature elected not by the State at large but by small constituencies, to encroach upon the control and direction of the state departments by means of any such legislative measures as those that have been discussed above and invalidated by the New York Court of Appeals in the case of *People* v. *Tremaine.*

WILLIAM D. GUTHRIE.

New York City, April, 1930.

[54] See recent publication (1930) by National Industrial Conference Board, Inc., entitled "Cost of Government in the United States" for statistics as to enormous increases in governmental expenditures, public indebtedness and tax levies.

APPENDIX.

ARTICLE IV-A.*

§1. On or before the fifteenth day of October in the year nineteen hundred and twenty-eight and in each year thereafter the head of each department of the state government, except the legislature and judiciary, shall submit to the governor itemized estimates of appropriations to meet the financial needs of such department, including a statement in detail of all moneys for which any general or special appropriation is desired at the ensuing session of the legislature, classified according to relative importance and in such form and with such explanation as the governor may require. Copies of such estimates shall be simultaneously furnished to the designated representatives of the appropriate committees of the legislature for their information. The governor, after hearings thereon, at which he may require the attendance of heads of departments and their subordinates, shall revise such estimates according to his judgment. The representatives aforesaid of the committees of the legislature shall be invited to attend such hearings, and under regulations to be provided by law shall be entitled to make inquiry in respect to the estimates and the revision thereof. Itemized estimates of the financial needs of the legislature certified by the presiding officer of each house and of the judiciary certified by the comptroller shall be transmitted to the governor on or before said fifteenth day of October for inclusion in the budget without revision but with such recommendation as he may think proper.

*Adopted November 8, 1927.

§2. On or before the fifteenth day of January next succeeding (except in the case of a newly elected governor and then on or before the first day of February) he shall submit to the legislature a budget containing a complete plan of proposed expenditures and estimated revenues. It shall contain all the estimates so revised or certified and clearly itemized, and shall be accompanied by a bill or bills for all proposed appropriations and reappropriations; it shall show the estimated revenues for the ensuing fiscal year and the estimated surplus or deficit of revenues at the end of the current fiscal year, together with the measures of taxation, if any, which the governor may propose for the increase of the revenues. It shall be accompanied by a statement of current assets, liabilities, reserves and surplus or deficit of the state; statements of the debts and funds of the state; an estimate of its financial condition as of the beginning and end of the ensuing fiscal year; and a statement of revenues and expenditures for the two fiscal years next preceding said year in form suitable for comparison. The governor may before final action by the legislature thereon, and not more than thirty days after submission thereof, amend or supplement the budget; he may also, with the consent of the legislature, submit such amendment or a supplemental bill at any time before the adjournment of the legislature. A copy of the budget and of any amendments or additions thereto shall be forthwith transmitted by the governor to the comptroller.

§3. The governor and the heads of departments shall have the right, and it shall be the duty of the heads of

departments when requested by either house of the legislature, to appear and be heard in respect to the budget during the consideration thereof, and to answer inquiries relevant thereto. The procedure for such appearance and inquiries shall be provided by law. The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose; none of the restrictions of this provision, however, shall apply to appropriations for the legislature or judiciary. Such a bill when passed by both houses shall be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature shall be subject to his approval as provided in section nine of article four.

§4. Neither house shall consider further appropriations until the appropriation bills proposed by the governor shall have been finally acted on by both houses; nor shall such further appropriations be then made except by separate bills each for a single work or object, which bills shall be subject to the governor's approval as provided in section nine of article four. Nothing herein contained shall be construed to prevent the governor from recommending that one or more of his proposed bills be passed in advance of the others to supply the immediate needs of government or to meet an emergency.

ARTICLE V.*

§1. The comptroller and attorney-general shall be chosen at a general election, at the times and places of electing the governor and lieutenant-governor, and shall hold office for the same term as the governor and lieutenant-governor. The comptroller shall be required: (1) to audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. In such respect the legislature shall define his powers and duties and may also assign to him supervision of the accounts of any political subdivision of the state, but shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this constitution to the contrary notwithstanding. Each of the officers in this article named shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation.

§2. There shall be the following civil departments in the state government: First, executive; second, audit and control; third, taxation and finance; fourth, law; fifth, state; sixth, public works; seventh, architecture; eighth, conservation; ninth, agriculture and markets; tenth, labor; eleventh, education; twelfth, health; thir-

*Adopted November 3, 1925; amended November 8, 1927.

teenth, mental hygiene; fourteenth, charities; fifteenth, correction; sixteenth, public service; seventeenth, banking; eighteenth, insurance; nineteenth, civil service; twentieth, military and naval affairs.

§3. At the session immediately following the adoption of this article the legislature shall provide by law for the appropriate assignment, to take effect not earlier than the first day of July, one thousand nine hundred and twenty-six, of all the civil, administrative and executive functions of the state government, to the several departments in this article provided. Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards or commissions continued or created under this constitution, and increase, modify or diminish their powers and functions. No specific grant of power herein to a department shall prevent the legislature from conferring additional powers upon such department. No new departments shall be created hereafter, but this shall not prevent the legislature from creating temporary commissions for special purposes and nothing contained in this article shall prevent the legislature from reducing the number of departments as provided for in this article, by consolidation or otherwise. The elective state officers in office at the time this article as amended takes effect shall continue in office until the end of the terms for which they were elected. Pending the assignment of the civil, administrative and executive functions by the legislature pursuant to the directions of this section, the powers and duties of the

several departments, boards, commissions and officers now existing are continued. Subject to the power of the legislature to reduce the number of officers, when the powers and duties of any existing office are assigned to any department, the officers exercising such powers shall continue in office in such department, and their term of office shall not be shortened by such assignment.

§4. The head of the executive department shall be the governor. The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. The head of the department of education shall be the regents of the university of the state of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department. The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.

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